

E-Filed 10/12/05

NOT FOR CITATION

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

JUAN D. MARTINEZ, et al.,

Plaintiffs,

V.

MONTEREY COUNTY, CALIFORNIA, et al.,

Defendants.

Case Number C 05-2950 JF

**ORDER DENYING MOTION TO
LIFT STAY**

[Doc. No. 53]

BEFORE: TALLMAN, Circuit Judge, FOGEL, District Judge, and ILLSTON, District Judge.¹

Plaintiffs move to lift the stay of the instant litigation imposed by this Court’s order of August 4, 2005 (“August 4 Order”). The Court has reviewed the briefing submitted by the parties and of *amicus curiae* Edward J. Costa. For the reasons discussed below, the motion will be denied.

¹ The Honorable Richard Tallman, United States Circuit Judge, United States Court of Appeals for the Ninth Circuit, and the Honorable Susan Illston, United States District Judge, Northern District of California, sitting by designation pursuant to 28 U.S.C. § 2284.

I. BACKGROUND

Plaintiffs allege that Defendants have failed to obtain preclearance of a change in voting procedures as required under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. “Section 5 governs changes in voting procedures, with the purpose of preventing jurisdictions covered by its requirements from enacting or seeking to administer voting changes that have a discriminatory purpose or effect.” *Lopez v. Monterey County*, 519 U.S. 9, 12 (1996). Defendant Monterey County is a covered jurisdiction and therefore must obtain federal preclearance of any voting practice different from the practices in effect on November 1, 1968. *Id.* at 11. A covered jurisdiction may obtain administrative preclearance of a change in voting procedure by submitting the enacting legislation to the Attorney General of the United States; “[i]f the Attorney General does not formally object to the new procedure within 60 days of submission, the jurisdiction may enforce the legislation.” *Id.* at 12. Alternatively, a covered jurisdiction may obtain judicial preclearance “by securing in the United States District Court for the District of Columbia a declaratory judgment that the new procedure ‘does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color’” *Id.* (citing 42 U.S.C. § 1973c).

Plaintiffs allege that a change in voting procedures occurred when proponents of Proposition 77, an initiative measure that has been placed on the ballot for a statewide special election on November 8, 2005, circulated a petition containing text that differed from the text of the measure that had been submitted to California’s Attorney General for preparation of a title and summary pursuant to state law. Plaintiffs filed the instant action on July 20, 2005, naming as defendants Monterey County, the State of California and California’s Secretary of State, Bruce McPherson. Plaintiffs filed the operative amended complaint on July 28, 2005. In conjunction with the filing of both pleadings, Plaintiffs sought a temporary restraining order (“TRO”) preventing Defendants from going forward with preparations to place Proposition 77 on the ballot absent Section 5 preclearance, as well as an order to show cause why a preliminary injunction should not issue.

On August 4, 2005, this Court issued an order denying without prejudice Plaintiffs'

1 application for TRO, granting Plaintiffs' motion to convene a three-judge panel and staying
 2 litigation of the instant action pursuant to the *Colorado River*² abstention doctrine. The Court's
 3 decision to abstain rested in large part upon the fact that the issue of whether Proposition 77
 4 should appear on the ballot was being litigated vigorously in a parallel state action commenced
 5 by California's Attorney General. At the time this Court issued its ruling denying Plaintiffs'
 6 application for TRO, the California Superior Court had issued an order directing that Proposition
 7 77 be stricken from the ballot on the ground that the discrepancies between the text submitted to
 8 the Attorney General and the text included in the petition were inconsistent with the requirements
 9 of California's Constitution and Elections Code; however, the California Court of Appeal, Third
 10 Appellate District, had stayed that order pending disposition of a petition for writ of mandate
 11 filed by the initiative measure's proponents. This Court reasoned that a state court determination
 12 that there has been a violation of state law sufficient to preclude inclusion of Proposition 77 on
 13 the ballot would moot the instant action, and that a contrary determination would bear
 14 significantly upon Plaintiffs' claim that there has been a material change in voting procedures.
 15 The Court requested that the parties notify it immediately of any change in the status of the state
 16 court proceedings.

17 On August 9, 2005, the California Court of Appeal denied the petition for writ of
 18 mandate, thus effectively reinstating the Superior Court's order that Proposition 77 be stricken
 19 from the ballot. On August 10, 2005, proponents of the initiative measure filed an emergency
 20 petition for review in the California Supreme Court. On August 12, 2005, that court granted the
 21 petition for review, stayed the judgment of the Superior Court and directed that the California
 22 Secretary of State go forward with preparations for including Proposition 77 on the ballot for the
 23 November 8 special election. The court concluded that there was an insufficient showing that the
 24 discrepancies between the version of the initiative measure submitted to the Attorney General
 25 and the version that was circulated for signature were likely to have misled the persons who
 26 signed the initiative petition, and that under such circumstances it would be inappropriate to deny

28 ² *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

1 the electorate the opportunity to vote on Proposition 77 at the special election. The court retained
 2 jurisdiction to resolve the question of substantial compliance with California law after the
 3 election. On August 15, 2005, Defendant Monterey County filed a status report advising this
 4 Court of the California Supreme Court's order. On the same date, the state printer received the
 5 final version of the Voter Information Guide; subsequently, the process of printing, binding and
 6 distributing approximately twelve million copies of the guide began.

7 On September 1, 2005, Plaintiffs electronically filed a document entitled, "Status
 8 Report." This document notified this Court of the developments in the state court proceedings
 9 and included a "suggestion" that the Court act *sua sponte* to lift the stay imposed by the August 4
 10 Order. Plaintiffs did not submit paper courtesy copies of the document as required by this
 11 Court's standing order with respect to any pleading requesting judicial action, nor did their
 12 counsel contact chambers to inform the Court that the document suggested or required any action
 13 by the Court. Later that day, Defendant McPherson electronically filed a letter objecting to
 14 Plaintiffs' "suggestion" that the Court act in the absence of a noticed motion and orderly briefing.
 15 On September 8, 2005, chambers staff discovered both Plaintiffs' status report and Defendant
 16 McPherson's letter in the course of a routine review of the docket in this case. On September 9,
 17 2005, the Court issued an order directing Plaintiffs to file a noticed motion if they wished to seek
 18 relief from the stay and further directing all parties to provide paper courtesy copies of future
 19 filings to all members of the three-judge panel. On September 22, 2005, Plaintiffs filed the
 20 instant motion as well as renewed motions for a TRO and a preliminary injunction. The mailing
 21 of the ballot pamphlets commenced on September 24, 2005. According to Defendants, the
 22 pamphlets cost \$3.9 million to print and will cost an additional \$3 million to mail. On
 23 September 26, 2005, this Court set an expedited briefing schedule on the instant motion and
 24 deferred action on Plaintiffs' remaining motions pending a determination as to whether the stay
 25 should be lifted. Briefing on the instant motion was completed on October 6, 2005.

26 II. DISCUSSION

27 As noted above, this Court has stayed the instant litigation pursuant to the *Colorado River*
 28 abstention doctrine, under which a federal court may defer to a parallel state court proceeding

1 based upon “considerations of wise judicial administration, giving regard to conservation of
 2 judicial resources and comprehensive disposition of litigation.” *Tovar v. Billmeyer*, 609 F.2d
 3 1291, 1293 (9th Cir. 1980) (quoting *Colorado River*, 424 U.S. at 817). The Ninth Circuit has
 4 enumerated six factors to be considered in determining whether *Colorado River* abstention is
 5 appropriate:

6 In *Colorado River*, the Court articulated four factors for determining whether
 7 sufficiently exceptional circumstances exist to warrant abstention: (1) whether
 8 either the state or federal court has exercised jurisdiction over a *res*; (2) the
 9 inconvenience of the federal forum; (3) the desirability of avoiding piecemeal
 10 litigation; and (4) the order in which the forums obtained jurisdiction. In *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, the Court added two more
 11 considerations: (5) whether federal or state law controls the decision on the
 12 merits; and (6) whether the state court can adequately protect the rights of the
 13 parties.

14 40235 *Washington Street Corp. v. Lusardi*, 976 F.2d 587, 588 (9th Cir. 1992) (internal citations
 15 omitted).

16 At the time it issued its August 4 Order, this Court concluded that while the first two
 17 factors were not implicated in the instant action, the last four factors mandated abstention. The
 18 issue of whether Proposition 77 should appear on the ballot was being litigated in a parallel state
 19 court action; the state action was filed before the instant action and was further along; the state
 20 courts’ determination of the state law questions at issue in the parallel action would bear upon –
 21 and could potentially moot – the questions at issue in the instant action; and Plaintiffs’ position
 22 was represented adequately in the state court action, although Plaintiffs themselves were not
 23 parties to that action.

24 Plaintiffs assert that these bases for abstention no longer exist in light of the California
 25 Supreme Court’s ruling that Proposition 77 will appear on the ballot and that issues of substantial
 26 compliance with state election law will be determined only after the election. Plaintiffs assert
 27 that the California Supreme Court’s order in essence approves the alleged change in voting
 28 procedures and is the functional equivalent of a legislative action adopting that change. Plaintiffs
 argue that under these circumstances, the question of Section 5 preclearance now is squarely
 presented in this action, and cite *Lopez* for the proposition that this Court *must* ensure that the
 election does not go forward with Proposition 77 on the ballot absent preclearance. *See Lopez*,

1 519 U.S. at 20 (stating that “[i]f a voting change subject to § 5 has not been precleared, § 5
 2 plaintiffs are entitled to an injunction prohibiting implementation of the change”).

3 However, Plaintiffs’ reliance upon *Lopez* ignores numerous critical differences between
 4 that case and this one. In *Lopez*, the plaintiffs alleged that judicial consolidation ordinances that
 5 resulted in a single, countywide municipal court constituted election changes subject to Section 5
 6 preclearance. *Lopez*, 519 U.S. at 15. The three-judge panel convened to address the claim
 7 agreed. *Id.* The panel, the plaintiffs and the county then spent several years attempting to reach
 8 agreement on a judicial election plan. During that period the panel permitted a special election to
 9 go forward under an interim plan for which preclearance was obtained. *Id.* at 18. However, in
 10 1996, *four years* after the plaintiffs commenced the action, the panel ordered the county to hold a
 11 regularly-scheduled election under the very *same* plan that the panel had determined had not been
 12 precleared as required. *Id.* at 19. The plaintiffs filed an emergency application in the United
 13 States Supreme Court to enjoin the 1996 election.

14 The Supreme Court determined that the panel’s order that an election go forward under a
 15 plan that had not been precleared was contrary to the principles embodied in Section 5 and in
 16 precedent. *Id.* at 20. The court concluded that the county had been on notice for several years
 17 that its electoral changes were subject to Section 5, but had failed to obtain administrative or
 18 judicial preclearance of those changes. *Id.* at 21. The court noted that it was an open question
 19 whether a district court ever could permit a covered jurisdiction to conduct an election under a
 20 voting plan that had not been precleared, and suggested that “[a]n extreme circumstance might be
 21 present if a seat’s unprecleared status is not drawn to the attention of the [covered jurisdiction]
 22 until the eve of the election and there are equitable principles that justify allowing the election to
 23 proceed.” *Id.* at 21-22 (quoting *Clark v. Roemer*, 500 U.S. 646, 654-55 (1991)). However, the
 24 court concluded that no such exigency existed with respect to the election at issue in *Lopez*.

25 In contrast, the type of exigency discussed in *Lopez* and *Clark* does exist here. While in
 26 *Lopez* it was determined years before the subject election that Section 5 was implicated, there has
 27 been no such determination in this case, and it is by no means evident as a matter of law what
 28 that determination will be. The Court in fact is being asked to make the determination on the eve

1 of the election. The State of California has spent millions of dollars to print and mail the Voter
 2 Information Guide and the ballot pamphlets, which include information on Proposition 77;
 3 indeed, it appears that absentee voting on Proposition 77 *already* is occurring.

4 Plaintiffs cannot be faulted for failing to move expeditiously in this Court initially,
 5 because the Court itself stayed the present federal action while awaiting a ruling by the California
 6 courts. However, the same cannot be said with respect to Plaintiffs' activity after the California
 7 Supreme Court restored Proposition 77 to the ballot on August 12, 2005. Plaintiffs did not even
 8 suggest that this Court should lift the stay until they filed their status report on September 1,
 9 nearly three weeks later. Even then, as noted above, they chose not to file a noticed motion and
 10 failed to comply with the express requirements of this Court's Standing Order. Plaintiffs cite no
 11 authority suggesting that this Court had a *duty* to act *sua sponte*. They did not file a cognizable
 12 motion to lift the stay until September 22, almost two weeks after the Court advised them
 13 specifically that they should do so and nearly six weeks after the California Supreme Court's
 14 decision. In a very real sense, Plaintiffs have created the exigent circumstances under which they
 15 now urge the Court to act.

16 Applying the *Colorado River* factors in light of the present situation, the Court concludes
 17 that abstention remains appropriate. The California Supreme Court has concluded that the
 18 November 8 election should go forward with Proposition 77 on the ballot and expressly has
 19 retained jurisdiction to make a post-election determination as to whether the measure's
 20 proponents complied substantially with California's election laws notwithstanding the
 21 discrepancies in the two versions of the measure. That court's ultimate determination of this
 22 issue may well moot the instant action; at the very least, its explication of California law will
 23 inform this Court's analysis of whether the discrepancies constitute a change in California's
 24 voting procedures sufficient to trigger Section 5.

25 While it is true, as Plaintiffs argue, that the question of whether the proponents of
 26 Proposition 77 have complied substantially with state election law is distinct from the *federal*
 27 question of whether there has been a change in voting procedures within the meaning of Section
 28 5, *amicus curiae* notes correctly that the California Supreme Court itself has jurisdiction to

1 decide, as a collateral matter, whether the asserted change in California's voting procedures
 2 requires Section 5 preclearance. *See Hathorn v. Lovorn*, 457 U.S. 255, 268-69 (1982). Given
 3 the close relationship between the legal issues in the two cases, continued abstention by this
 4 Court will avoid the type of piecemeal litigation eschewed in *Colorado River*.

5 In the event that the instant action is not rendered moot either by the decision of the
 6 California Supreme Court or the voters' rejection of Proposition 77, this Court clearly is
 7 empowered to address Plaintiffs' Section 5 claim after the election. *See Berry v. Doles*, 438 U.S.
 8 190, 193 (1978); *Perkins v. Matthews*, 400 U.S. 379, 441 (1971). In *Berry*, the plaintiffs filed
 9 suit four days prior to scheduled primary and general elections, alleging that a change in state
 10 voting law had not been precleared as required by Section 5. The plaintiffs' request for
 11 declaratory and injunctive relief was not acted upon until after the elections, at which point a
 12 three-judge panel concluded that Section 5 was implicated and prospectively enjoined further
 13 elections under the new law absent preclearance; however, the panel refused to set aside the
 14 elections that already had been conducted under the new law. On appeal, the United States
 15 Supreme Court affirmed the determination that preclearance was required under Section 5, but
 16 reversed and remanded insofar as the three-judge panel had declined to order relief with respect
 17 to the elections that had occurred under the new law. On remand, the district court was
 18 instructed to issue an order allowing the appellees thirty days within which to apply for approval
 19 of the new law under Section 5. *Berry*, 438 U.S. at 193.

20 In *Perkins*, the plaintiffs brought suit to enjoin citywide elections for mayor and
 21 aldermen, alleging that changes in the locations of polling places, changes in the municipal
 22 boundaries and a change from ward to at-large election of aldermen were subject to preclearance
 23 under Section 5. Pending the designation of a three-judge panel, the district court temporarily
 24 restrained the elections, but subsequently the three-judge panel dissolved the injunction and
 25 dismissed the complaint. The elections were held pursuant to the challenged changes. On
 26 appeal, the Supreme Court reversed, holding that the changes implicated Section 5. However,
 27 the court declined to set aside the elections and instead remanded to the district court with
 28 instructions to enjoin future enforcement of the changes until the changes were precleared and to

1 fashion an appropriate remedy with respect to the election that already had occurred. The court
 2 noted that “[i]n certain circumstances for example, it might be appropriate to enter an order
 3 affording local officials an opportunity to seek federal approval and ordering a new election only
 4 if local officials fail to do so or if the required federal approval is not forthcoming.” *Perkins*, 400
 5 U.S. at 396-97.

6 While *Berry* and *Perkins* are not precisely on point, these cases leave no doubt that this
 7 Court may fashion an appropriate post-election remedy for the Section 5 violation alleged by
 8 Plaintiffs if and when it is determined that a change requiring Section 5 preclearance has
 9 occurred. The alternative is to enjoin an election that is less than four weeks away, in which
 10 absentee voting already has commenced, and in connection with which the State of California
 11 already has expended millions of dollars in public funds. While post-election determination of
 12 Section 5 issues ordinarily is not desirable, the Court concludes that the equities and the totality
 13 of the circumstances presented in this case render continued abstention the most appropriate of
 14 the several undesirable courses open to it.

15 Accordingly, Plaintiffs’ motion to lift the stay is DENIED. The Clerk is directed to
 16 terminate Plaintiffs’ remaining motions without prejudice.

17
 18 DATED: October 12, 2005

19 /s/ electronic signature authorized

20

 RICHARD TALLMAN
 21 United States Circuit Judge

22 /s/ electronic signature authorized

23

 JEREMY FOGEL
 24 United States District Judge

25 /s/ electronic signature authorized

26

 SUSAN ILLSTON
 27 United States District Judge

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